Supreme Court, U. S.
FILED
SEP 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 74-279

SEBASTIAN JESSE MIRELEZ,
Petitioner

Against

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(And Appendices)

PHILIP S. GREENE
Attorney for Petitioner
1717 South Shepherd
Houston, Texas 77019
(713) 526-2131

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	6
STATEMENT OF FACTS	6
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	11
APPENDIX A—Judgment of the District Court	13
APPENDIX B—Opinion of the Court of Appeals	15
APPENDIX C—Judgment of the Court of Appeals	20
APPENDIX D—Denial of Petitioner for Leave to File Out of Time	22
APPENDIX E—Constitutional and Statutory Provisions Involved	23
APPENDIX F—Counts V and VI of the Indictment	24

CITATIONS

CASES	Page
Sivaro v. United States, 377 F.2d 469	3, 4
Divarco v. United States, 484 F.2d 670	4, 9
Poonion v. United States, 294 F.2d 74	5

UNITED STATES CONSTITUTION

Fifth Amendment	9

UNITED STATES STATUTES

Title 26 U.S.C., Section 7206(1)	2, 4, 5, 6, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO._____

SEBASTIAN JESSE MIRELEZ,
Petitioner

Against

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(And Appendices)

The Petitioner, SEBASTIAN JESSE MIRELEZ, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered July 1, 1974.

OPINIONS BELOW

The United States District Court for the Southern District of Texas entered Judgment on January 11, 1974. A copy is attached as Appendix A, *infra*, p. 13. The United

States Court of Appeals for the Fifth Circuit rendered an Opinion on July 1, 1974, a copy is attached as Appendix B, *infra*, p. 15. The Judgment of the Court of Appeals for the Fifth Circuit is attached as Appendix C, *infra*, p. 20. A Motion for Stay of Mandate and a Motion for Rehearing En Banc were filed with the Appeal Court below along with a Petition for Leave to File Motion for Rehearing and Suggestion for En Banc. This petition for rehearing was denied on July 29, 1974, and that judgment is attached as Appendix D, *infra*, p. 22.

JURISDICTION

The Petition for Leave to File Motion for Rehearing Out of Time was denied on July 29, 1974. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

First Question

Is the failure to disclose a source of income on a Federal Income Tax Return Form 1040, an offense within the meaning of Title 26 U.S.C., Section 7206(1)? This point was raised in Petitioner's Appeal Brief, however, the Court below did not answer this crucial question in their Opinion of July 1, 1974.

Second Question

Is the Fifth Amendment of the United States Constitution a complete defense to not stating the *source* of one's income on an Income Tax Return Form 1040, if said income was made illegally? This question was also raised below, and the Appeals Court did not answer this question either.

Third Question

Did the Court below rule erroneously when they stated "the violations to which MIRELEZ pled guilty were complete with the omission of gross income" in view of the fact that the income tax evasion counts, Counts I through IV of the Indictment against MIRELEZ were dismissed, and there was no evidence at any time before any Court to show that there was an omission of gross income? MIRELEZ did, in fact, report gross income for the taxable years in question and that reported income was cited in the Government's indictment Counts I through IV. However, in the two perjury counts that MIRELEZ pled guilty to, there is no reference to any exact amounts of money not reported.

Fourth Question

Was the Court below bound by the exact wording of the two counts of the Indictment to which the Petitioner pled guilty, or could they "add" or "subtract" to that wording so that the Indictment would comply with what the Government attempted to explain as the "true meaning" of the Indictment in the Government's Answer Brief to the Court below?

This question is pertinent, because the Petitioner pled guilty to the *exact* wording of the Indictment and as the record below reflects, Petitioner so stated when he entered his plea of guilty.

Fifth Question

Did the Court below err in holding that "source of income" was not an essential element of the Indictment under which MIRELEZ was charged in view of *Sivaro v. United States*, 377 F.2d 469 (C.A. 1, 1967) which held

that a return which omits material items is not "true and correct" within the meaning of 26 U.S.C., Section 7206(1)? Further in *Divarco v. United States,* 484 F.2d 670 (C.A. 7, 1973) in which the Government cited *Sivaro v. United States,* supra as authority it was held that a false statement of source of income was a material matter within the meaning of 26 U.S.C., Section 7206(1). The Court in that case in upholding the conviction stated:

> "Surely, save the amount, there is no more material matter on a tax return than the source of income . . . We hold that the source of one's income as stated on the Federal Income Tax Return is a material matter within the meaning of 26 U.S.C., Section 7206(1) and as such the Government may properly prosecute a taxpayer falsely stating the source of his income on his Federal Income Tax Return."

The Petitioner certainly thought source of income was an essential element of the Indictment as the record below would again reflect. At the sentencing hearing on January 10, 1974, the Petitioner stated in open Court:

> "Well, my only, ever only crime was that I failed to state the source of my income."

Sixth Question

Did the two counts of the Indictment which MIRELEZ pled guilty to state an offense within the meaning of 26 U.S.C., Section 7206(1), if the Trial Court and the Appellate Court are correct in their interpretation that the language "from the sale of Heroin" was not essential, but merely surplusage? If the Courts below are correct, then the Petitioner pled guilty to the surplusage. If the Courts below are correct, then the above quoted language

can be omitted from the Indictment and one is left with the following language: (Counts V and VI are identical except for the taxable years covered):

COUNT V

> "On or about May 15, 1974. in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, SEBASTIAN JESSE MIRELEZ, Defendant, a resident of Houston, Texas, did wilfully and knowingly make and subscribe his Form 1040, Income Tax Return, for the calendar year 1966, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said Form 1040 he did not believe to be true and correct as to every material matter in that the said Form 1040 did not disclose the fact that the defendant received gross income whereas he then and there well knew and believed, he had received gross income."

(Violation: Title 26 U.S.C., 7206(1)

If this construction is correct, then it would appear that these counts fail to state an offense under Title 26 U.S.C., Section 7206(1) in that Counts I through IV of the Indictment all allege that gross income was reported and give certain specific amounts of reported income for the taxable years in question. Further, if this construction of the Indictment is correct, it fails to state an offense in that it does not allege that the income reported was overstated, understated, or correct. An overstatement of gross income is not a crime, *Poonion v. United States,* 294 F.2d 74 (C.A. 9, 1961). Therefore, it would be necessary to add the word "understated" to the Indictment before it could be construed to state an offense if one omits "from the sale of Heroin."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution and Title 26 U.S.C., Section 7206(1). (Reproduced in Appendix E, infra, p. 23).

STATEMENT OF FACTS

The Defendant was indicted in an eight Count Indictment within the jurisdiction of the United States District Court for the Southern District of Texas. The first four counts of the Indictment alleged that the Defendant evaded income taxes for the years 1966 through 1969. The remaining counts allege that on each of those returns he failed ". . . to disclose the fact that Defendant received gross income from the sale of Heroin . . ." which is alleged to be a violation of Title 26 U.S.C., Section 7206(1). The Defendant filed a Motion to Dismiss Counts V through VIII on the grounds that Defendant could not be compelled to state that the source of his income was from the sale of Heroin because of his Fifth Amendment privilege against self-incrimination. Said Motion was denied by the Trial Court.

As a result of plea bargaining, with the knowledge of the Trial Court, a trade was made between the Defendant and the Government. The terms were briefly as follows: The Defendant would plead guilty to Counts V and VI of the Indictment and his right to appeal was expressly reserved with the consent of the Government and the Trial Court. No evidence was ever introduced as to any part of the Indictment. These two counts are the only counts to which the Defendant pled guilty and upon which sentence was pronounced. The Judge of the Trial Court sentenced

the Defendant to three (3) years in prison and a $5,000.00 fine on each of these two counts. It is from this judgment that Defendant is appealing. Counts V and VI were identical except they cover two different yearly returns. (Reproduced in Appendix F, infra, p. 23).

With the exception of dates, Counts V and VI read verbatim as follows:

> "On or about May 15, 1967, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, SEBASTIAN JESSE MIRELEZ, Defendant, a resident of Houston, Texas, did wilfully and knowingly make and subscribe his Form 1040 Income Tax Return for the calendar year 1966, which was verified by a written declaration that was made under the penalties of perjury and was filed with the Internal Revenue Service, which said Form 1040 he did not believe to be true and correct as to every material matter, in that the said Form 1040 did not disclose the fact that Defendant received gross income from the sale of Heroin, whereas, as he then and there well knew and believed, he had received gross income from the sale of Heroin."

On January 10, 1974, the Petitioner was sentenced and was committed to the United States Marshal. Some time later he was transfered from the Harris County Detention Center to the Federal Penitentiary in Leavenworth, Kansas where he remains. The Petitioner appealed to the Court of Appeals for the Fifth Circuit, and that Court affirmed his conviction on July 1, 1974. Petitioner's Attorney, Philip S. Greene, of Houston, Texas, received notice of the Judgment by regular mail on July 3, 1974. Then due to the Fourth of July holiday and having to use the mail to communicate with the Petitioner, the Motion for Rehearing En Banc and a Petition for Stay of Mandate

arrived in New Orleans, Louisiana one (1) day late even though they were sent Air Mail Registered. However, one of the Docket Clerks of the Fifth Circuit had informed Counsel that when the mail was used the postmark date served as the filing date, and the Motions were postmarked before the 14th day time limit had run. However, this information was obviously incorrect, and the Clerk called Petitioner's Attorney and stated that the Motions were out of time, but not to worry, just to file a Petition for Leave to File Out of Time and that these were always granted in this type of situation. Then, on the 30th day from date of Judgment, Petitioner's Attorney received an Order from the Fifth Circuit denying the Petition to File Out of Time. Therefore, Petitioner was out of time to file this Application for Writ of Certiorati before he had exhausted his remedies with the Court below. It would seem only proper to this writer that if the Court below chose to serve notice of their affirmance by regular mail, then the time limit for filing a Motion for Rehearing should be extended three (3) days in accordance with Federal Rules of Appellate Procedure 26(c), since two of the fourteen (14) days had already expired before Petitioner's Attorney knew the Court had afirmed the conviction.

REASONS FOR GRANTING THE WRIT

I.

The Petitioner has raised an important constitutional question, which has not been answered by any Circuit as of yet. The Fifth Circuit totally misstated Petitioner's argument in their Opinion of July 1, 1974. Petitioner never urged that income made illegally need not to be reported, rather it is Petitioner's argument that one need not report the *source* of one's income if disclosing that

source would incriminate the taxpayer, relying on the Fifth Amendment of the United States Constitution.

II.

Another reason for granting this Writ would be that the United States Court of Appeals for the Fifth Circuit violated Petitioner's basic and fundamental right of the presumption of innocence when they held that Petitioner was charged in Counts V and VI of the Indictment with wilful failure to report certain gross income and that the violations were complete with the omission of gross income regardless of its source. This finding was totally erroneous since there was no evidence before any Court that the amount of income reported on Petitioner's Form 1040 was incorrect. It would appear that the Court below took the position that since Petitioner was indicted for evasion of taxes in Counts I through IV, he must have been guilty and falsely stated the amount of his income. The Court must remember these counts were dismissed, and, therefore, there is no evidence, not even a scintilla that would indicate to any Court that the Petitioner wilfully failed to report certain gross income.

III.

The third reason for granting this Writ of Certiorari is that the ramifications of this case in view of the *Sivaro,* supra, and *Divarco,* supra, cases are extremely far reaching, and of this date there are no clear answers to serve as guide lines in preventing criminal exposure or conduct under Title 26, U.S.C.(1). The Petitioner requested the Court below to comment upon some of these problems, however, they chose not to do so. In fact they stated "If the Defendant desired to test that or any other point he

should have tested it in the Return." This appears to be a rather harsh request. It is like stating put your head on the chopping block and see if the ax falls or not. A taxpayer should have some notice as to what the criminal law is, so that he may comply with the law and avoid criminal prosecution. This is again a fundamental principle of the law of our country. More specifically, some of the important problems raised by these cases are as follows:

(a) Whether or not the grouping of sources of income (or the failure to set out each specific source) an event which occurs with great frequency is a violation under Title 26, Section 7206(1)?
(b) Whether or not it is possible to force a requirement that only every source of illegal income must be disclosed?
(c) Whether omission of the source of income constitutes criminal conduct?
(d) What constitutes "source"?
(e) How much money constitutes a source of income?
(f) Are such requirements capable of being enforced under 26 U.S.C. 7206(1)?
(g) If sources of income may be grouped or combined, what are the magic words to avoid criminal conduct?
(h) If omission of source is a criminal act under 26 U.S.C., 7206(1), how does a taxpayer report income made illegally since misrepresentation of source has been held to be a violation of 26 U.S.C., 7206(1)?

The final reason for granting this Writ is that the Fifth Circuit ruling is incomplete in that they did not answer the constitutional questions as raised, and further, that their Opinion and ruling as to source not being a material matter is in conflict with decisions from other Circuits.

CONCLUSION

For the reason stated, a Writ of Certiorari should be Granted.

Respectfully submitted,

PHILIP S. GREENE
Attorney for Petitioner
1717 South Shepherd
Houston, Texas 77019
(713) 526-2131

CERTIFICATE OF PROOF OF SERVICE

I, PHILIP S. GREENE, Attorney for the Petitioner in the foregoing entitled and numbered cause, hereby certifies that on the _____ day of _____, A.D. 1974, I served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable Mary L. Sinderson, Assistant United States Attorney, United States District Court for the Southern District of Texas, Houston Division, by depositing an envelope containing such copy in the United States Post Office in Houston, Texas, with first class postage prepaid affixed thereto, addressed to her Office in the Federal Building, 515 Rusk Avenue, Houston, Texas 77002.

PHILIP S. GREENE
Attorney for Petitioner

APPENDIX A

JUDGMENT OF THE DISTRICT COURT

JUDGMENT AND COMMITMENT

Filed: January 11, 1973

United States District Court for the
Southern District of Texas, Houston Division

No. 72-H-418

United States of America

versus

Sebastian Jesse Mirelez

On this 10th day of January, 1974 came the attorney for the government and the defendant appeared in person and with attorney Philip Greene.

IT IS ADJUDGED that the defendant upon his plea of guilty and the Court being satisfied there is a factual basis for the plea has been convicted of the offense of making and subscribing false income tax returns under penalties of perjury in violation of Title 26, United States Code, Section 7206(1) as charged in counts five and six of the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS and fined the sum of Five Thousand ($5,000.00) Dollars on count five and THREE (3) YEARS and fined the sum of Five Thousand ($5,000.00) Dollars on count six to run consecutively for a total of SIX (6) YEARS and fined the sum of Ten Thousand ($10,000.00) Dollars.

IT IS ADJUDGED that counts one, two, three, four, seven and eight of the Indictment are hereby dismissed on motion of the United States Attorney.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ BEN C. CONNALLY
United States District Judge

DONE at Houston, Texas, this
11th day of January, 1974.

APPROVED:

/s/ RONALD J. WASKA

APPENDIX B

OPINION OF THE COURT OF APPEALS

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SEBASTIAN JESSE MIRELEZ, *Defendant-Appellant.*

No. 74-1166

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

July 1, 1974.

The United States District Court for the Southern District of Texas, Ben C. Connally, Chief Judge, pursuant to guilty plea, found defendant guilty on two counts of indictment charging him with willfully making false statements in his income tax returns, and defendant appealed. The Court of Appeals held that offense of willfully making false statements in tax return was complete with omission of gross income regardless of its source, and that claim that taxpayer could not be forced to incriminate himself by stating in his tax return that source of income was illegal sale of heroin was not a defense to charge.

Affirmed.

---

* Rule 18, 5 Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir. 1970, 431 F.2d 409, Part I.

1. Internal Revenue (Key) 2408

Gist of offense of willfully making false statements in income tax returns is willfully false statement with respect to material fact or facts susceptible of proof. 26 U.S.C.A. (I.R.C. 1954) § 7206(1).

2. Internal Revenue (Key) 2408

Offense of willfully making false statements in income tax returns was complete when taxpayer omitted gross income, regardless of source of such income. 26 U.S.C.A. (I.R.C. 1954) § 7206(1).

3. Criminal Law (Key) 393(1)

Claim that taxpayer could not be forced to incriminate himself by stating in his tax return that source of income was illegal sale of heroin was not a defense to charge of willfully making false statements in income tax returns. 26 U.S.C.A. (I.R.C. 1954) § 7206(1); U.S.C.A. Const. Amend. 5.

4. Criminal Law (Key) 274(3), 1026

Where taxpayer, who pleaded guilty to charge of willfully making false statements in income tax return, claimed on appeal that indictment was defective for failure to state an offense and that statute forming basis of charges was unconstitutional infringement of taxpayer's Fifth Amendment privilege, issues involved question of jurisdiction of court which could be raised on appeal without reservation of right to appeal by defendant who pleaded guilty, and defendant was not entitled to have guilty plea set aside pursuant to decision disapproving agreement between prosecutor and defendant whereby guilty plea is entered with reservation of right to appeal nonjurisdictional defects. U.S.C.A. Const. Amend. 5.

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, DYER and RONEY, Circuit Judges.

PER CURIAM:

Mirelez pled guilty to two counts of an indictment charging him with willfully making false statements in his income tax returns for the calendar years 1966 and 1967 by the omission of gross income derived from the sale of heroin. He argues that the failure to report the source of income as heroin sales is an essential element for which he was charged and "that the imposition of such a 'harsh disclosure' requirement is the wrong thing to do." He further asserts that he cannot be compelled to state the source of his income because it would tend to incriminate him. We affirm.

[1, 2] It is clear that Mirelez was not charged with falsely stating the *source* of his income but rather was charged with the willful failure to report certain gross income unuder 26 U.S.CA. 7206(1), a perjury statute.[1] The gist of the offense is a willfully false statement with respect to material fact or facts susceptible of proof. Kolaski v. United States, 5 Cir. 1966, 362 F.2d 847, 848.

---

1. Title 26 U.S.C.A. § 7206(1)

Any person who—

(1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, annd which he does not believe to be true and correct in every material matter;

* * * * * * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Accord, United States v. Lewis, 5 Cir. 1972, 475 F.2d 571, 573-574. Thus the violations to which Mirelez entered his pleas of guilty were complete with the omission of gross income, regardless of its source. United States v. Garcilaso de la Vega, 2 Cir. 1974, 489 F.2d 761, 765.

[3] We are equally unimpressed with Mirelez' argument that he cannot be forced to incriminate himself by stating in his tax return that the source of income was the illegal sale of heroin. "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." United States v. Sullivan, 1927, 274 U.S. 259, 263-264, 47 S.Ct. 607, 608, 71 L.Ed. 1037.

[4] Finally, relying on United States v. Sepe, 5 Cir. 1973, 486 F.2d 1044 (en banc), Mirelez now asserts that since we have disapproved any agreement between the prosecutor and defendant whereby a guilty plea is entered with a reservation of the right to appeal non-jurisdictional defects, he is entitled to have the adjudication of guilt based upon his plea reversed and have the case remanded so that he may plead anew. We disagree. The issues raised on this appeal go to the jurisdiction of the district court, *i.e.* an attack upon the indictment for failure to state an offense, and an assertion that the statute forming the basis of the charges in the two counts to

which pleas were entered is an unconstitutional infringement of Mirelez' Fifth Amendment privilege. These issues were expressly excepted in Sepe and could be raised on appeal without specifically reserving the right to do so. *Sepe* simply disapproved the reservation of a right to appeal non-jurisdictional defects after a guilty plea.

We have considered and find without merit the other issues raised on appeal.

Affirmed.

APPENDIX C

JUDGMENT OF THE COURT OF APPEALS

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term 1973

NO. 74-1166

Summary Calendar

D. C. Docket No. CR 72-H-418

UNITED STATES OF AMERICA, Plaintiff-Appellee

versus

SEBASTIAN JESSE MIRELEZ, Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before COLEMAN, DYER and RONEY, Circuit Judges

JUDGMENT

This cause came on to be heard on the Transcript of the Record from the United States District Court for the

Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 1, 1974

Issued as Mandate: July 29, 1974

APPENDIX D

DENIAL OF PETITIONER FOR LEAVE TO FILE OUT OF TIME

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 74-1166

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SEBASTIAN JESSE MIRELEZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before COLEMAN, DYER and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for leave to file a petition for rehearing en banc out of time is DENIED.

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 26, Section 7206(1)

(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.

Fifth Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX F

COUNTS V AND VI OF THE INDICTMENT

Count V

On or about May 15, 1967, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, SEBASTIAN JESSE MIRELEZ, defendant, a resident of Houston, Texas, did wilfully and knowingly make and subscribe his Form 1040, income tax return, for the calendar year 1966, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said Form 1040 he did not believe to be true and correct as to every material matter, in that the said Form 1040 did not disclose the fact that defendant received gross income from the sale of heroin, whereas, as he then and there well knew and believed, he had received gross income from the sale of heroin. (Violation: Title 26, United States Code, Section 7206(1))

Count VI

On or about April 15, 1968, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, SEBASTIAN JESSE MIRELEZ, defendant, a resident of Houston, Texas, did wilfully and knowingly make and subscribe his Form 1040, income tax return, for the calendar year 1967, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said Form 1040 he did not believe to be true and correct as to every material matter, in that the

said Form 1040 did not disclose the fact that defendant received gross income from the sale of heroin, whereas, as he then and there well knew and believed, he had received gross income from the sale of heroin. (Violation: Title 26, United States Code, Section 7206(1))

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-279

SEBASTIAN JESSE MIRELEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner pled guilty in the United States District Court for the Southern District of Texas to two counts of filing false federal income tax returns, in violation of Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1). He was sentenced to two consecutive terms of three years' imprisonment and fined a total of $10,000. Petitioner then appealed, pursuant to a prior agreement with the United States Attorney, contending that the indictment failed to state an offense and that Section 7206(1) unconstitutionally infringed his privilege against self-incrimination. The court of appeals affirmed (Pet. App. B). Petitioner here renews his constitutional challenge.

The judgment of the court of appeals was entered on July 1, 1974.[1] The petition was not filed until September 16, 1974, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. Petitioner's contentions are, in any event, without merit.

1. Petitioner's contention (Pet. 8-9) that Section 7206(1) unconstitutionally infringed his privilege against self-incrimination is based upon a misreading of the statute and a misinterpretation of the indictment.

Section 7206(1), like 18 U.S.C. 1001, punishes only the making of declarations, under penalties of perjury, which the declarant does not believe to be true and correct as to every material matter; it does not compel testimony or otherwise infringe the privilege against self-incrimination in any way. See *Kolaski* v. *United States*, 362 F. 2d 847, 848 (C.A. 5). Cf. *Bryson* v. *United States*, 396 U.S. 64; *United States* v. *Knox*, 396 U.S. 77.

The indictment charged petitioner with having violated Section 7206(1) by willfully failing to report gross income which he knew that he had received. For purposes of specificity, the indictment described the omitted gross income in question as having been received from the sale of heroin. Petitioner apparently would have this Court construe the indictment as charging him merely with failing to identify the illegal source of his income. But the gravamen of the charge was petitioner's false statement of the amount of his gross income, not his failure to state its source. As in *United States* v. *Garcilaso de la Vega*, 489 F. 2d 761, 765 (C.A. 2), the offense charged was "the failure to report income, not the failure to report the source of the income." This fact was explained to petitioner at the time he made his guilty plea (Tr. of 10/29/73, pp. 6, 10).

---

[1]Petitioner filed an untimely petition for rehearing, but his motion to file out of time was denied on July 29, 1974.

Thus petitioner's underlying contention (Pet. 9-10) is that the Fifth Amendment entitles him to falsify his income tax returns by omitting to report gross income when a statement of the source of that income would be incriminating. The Court rejected an equivalent contention in *Bryson* v. *United States, supra*, 396 U.S. at 72:

> But after *Dennis* [v. *United States*, 384 U.S. 855] it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. [Footnote omitted.]

Petitioner's proper recourse was to report his gross income correctly and to refuse on Fifth Amendment grounds to state the source. *United States* v. *Sullivan*, 274 U.S. 259, 263-264.

2. Petitioner also appears to suggest (Pet. 9) that there was no factual basis for the district court's acceptance of his guilty plea. That contention was not raised in the court of appeals and therefore is not appropriately before this Court. See, *e.g., Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. Petitioner's remedy, if he believes that the record fails to show a factual basis for his plea, is to bring a motion to vacate sentence pursuant to 28 U.S.C. 2255.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.